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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE W. PALMER,) No. 22,084
)
Appellant,)
)
vs.)
)
HOWARD M. COMSTOCK, et al,)
)
Appellees.)

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

Appellant is a California state prisoner who filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California pursuant to 28 U.S.C. Sections 2241 and 2242. He seeks his release from state prison upon the ground that his parole was improperly revoked by the California Adult Authority. Following an order to show cause, Appellee filed its return and Appellant filed his traverse thereto. By memorandum and order dated May 18, 1967, the District Court dismissed the petition. The District Court granted a certificate of probable cause by order dated June 21, 1967, and jurisdiction for this appeal exists under 28 U.S.C. Section 2253.

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STATEMENT OF THE CASE

Appellant was committed to state prison on April 25, 1961, by judgments of the Los Angeles Superior Court following convictions on five charges of issuing worthless checks without sufficient funds, the sentences to run concurrently (Record, pp. 60-65). Appellant has not attacked the validity of these judgments.

On March 8, 1962, the California Adult Authority fixed the term of Appellant's concurrent sentences at 3-1/2 years (Record, p. 62). On April 15, 1962, Appellant was released on parole.

On October 9, 1964, Appellant's parole officer prepared a parole violation report specifying violations of the conditions of his parole as follows:

> "(1) George Wm Palmer did violate Condition 2 of the Conditions of Parole by leaving the State of California without the knowledge or permission of his parole agent.
>
> "(2) George Wm Palmer did violate Condition 12 of the Conditions of Parole by:
>
> (a) By signing a note with the Union Bank at its Beverly Hills Office in the amount of $2500.00 on 4-18-63.
>
> (b) By signing a note with the Continental Bank at its Sunset

Office in the amount of $3500.00 on 5-15-64.

(c) By being a co-signer with Mavis Palmer, president of Imagineers, Inc., with the Continental Bank at its Sunset Office in the amount of $6500.00 on 7-20-64.

(d) By signing a continuing guarantee with Continental Bank in the amount of $10,000.00 in the name of Imagineers, Inc., and/or George Palmer on 5-15-64.

(e) By being a co-signer with Mavis Palmer, president of Imagineers, Inc., and also as individuals on a note to Mr. Adam Hettich in the amount of $10,000.00 on 3-3-64.

"(3) George Wm Palmer did violate Condition 11 of the Conditions of Parole by committing the offense of issuing checks with non-sufficient funds and against a closed account."

(Record, pp. 73-81.)

On October 15, 1964, Appellant's parole was cancelled and petitioner was ordered returned to prison for the reasons set forth in the parole violation report

which was incorporated into the order of cancellation and the term was refixed at the maximum in accordance with Resolution 171 adopted March 6, 1951 (Record, p. 70). On October 20, 1964, Appellant was returned to the California State Prison at Chino and on November 2, 1964, he was transferred to the California State Prison at San Quentin. On December 10, 1964, the California Adult Authority held a hearing at San Quentin on the parole violation charges. Appellant pleaded not guilty to the charges. He was found guilty and his parole was revoked (Record, p. 70).

On October 29, 1965, Appellant was transferred to the Sierra Conservation Center at Jamestown. On March 29, 1966, Appellant filed a petition for a Writ of Habeas Corpus in the Tuolumne County Superior Court including as grounds that he was denied due process:

> "(1) because he was denied counsel at an alleged 'hearing' on December 10, 1964 before the Adult Authority,
>
> "(2) because of the place of this hearing and
>
> "(3) because at the hearing he was charged with at least one crime and was not able to be represented by counsel and/or subpoena witnesses in his behalf."

On April 15, 1966, a hearing was held upon an order to show cause at which Appellant was represented by counsel. On April 18, 1966, the Tuolumne County Superior Court made its order denying the petition for writ of habeas corpus after finding that Appellant was not represented by counsel and had been denied counsel at his parole revocation hearing on December 10, 1964, because Appellant had no right to notice or a hearing on revocation of his parole (Record, p. 17).

On November 7, 1966, Appellant filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California alleging the same grounds as his habeas petition in the Tuolumne County Superior Court. In its Order to Show Cause the District Court stated:

> "Petitioner alleges that at the time of his hearing before the California Adult Authority, he was denied, over objection, representation by counsel. Petitioner further alleges that he had made arrangements for representation and that an attorney was willing and able to appear in his behalf. Those allegations would appear to present substantial issues cognizable in the federal courts (See: Jones v. Rivers, 338 F.2d 862)."

Return was made to the order and Appellant filed his traverse thereto. The District Court dismissed the petition by Memorandum and Order dated May 18, 1967, in which the court stated:

> "Petitioner's sole claim for relief is that the failure of the California Adult Authority to allow his attorney to be present at petitioner's parole revocation proceeding was a denial of rights secured to him under the Fourteenth Amendment to the Constitution of the United States. This Court was of the view that a substantial constitutional question was raised by that allegation. The United States Court of Appeals for the Ninth Circuit, however, has taken an opposite view and that puts the issue to rest so far as this Court is concerned. In Williams v. Dunbar (No. 21, 395, decided April 26, 1967), the Court of Appeals held that a parolee who disputed an alleged violation of the conditions of his parole was not entitled to a court hearing, representation by counsel, confrontation of witnesses and process to obtain witnesses in his behalf. Since

> the Williams case arose under the Civil Rights Acts, Title 42 U.S.C. §§ 1983, 1985, the Federal Rules of Civil Procedure applied as did federal civil practice law. Accordingly, the appellant in Williams would have been entitled to relief on any one of the several elements of the claim he made, if that element rose to constitutional stature. The Court having denied all relief in Williams, this Court must assume that it is the law of the Ninth Circuit that denial of counsel at the time of revocation of parole before a state administrative agency does not present a federal constitutional question."

Appellant appeals from the foregoing order of dismissal.

APPELLANT'S CONTENTIONS

Appellant contends: (AOB p. 8)

1. That a state prisoner on parole has a federal constitutional right to the assistance of counsel at a parole violation hearing.

2. That a state prisoner on parole has a federal constitutional right to a parole violation hearing at a location reasonably near the place of the alleged parole violations.

3. That revocation of a state prisoner's

parole cannot be based solely upon the unsworn written report of the parole officer.

ARGUMENT

I. A CALIFORNIA PRISONER ON PAROLE HAS NO CONSTITUTIONAL OR STATUTORY RIGHT TO NOTICE OR HEARING ON REVOCATION OF HIS PAROLE.

The California Adult Authority is authorized by statute to revoke the parole of any state prisoner for cause without notice. (Penal Code § 3060 and § 3063.) Prisoners on parole shall remain under the legal custody of the Department of Corrections and shall be subject at any time to be taken back within the enclosure of the prison. (Penal Code § 3056.) The California Supreme Court has held that the Penal Code provisions for revoking parole do not violate due process because of the absence of a requirement for notice or hearing. People v. Dorado (1965) 62 Cal.2d 338, 359, 398 P.2d 361.

The United States Supreme Court has not passed on the question whether the federal constitution requires notice or hearing on revocation of parole. [See Richardson v. Markley (1965, Seventh Circuit) 339 F.2d 967, 969.]

In Williams v. Dunbar (1967, Ninth Circuit) 377 F.2d 505, a California state prisoner brought an action under the Civil Rights Act claiming that in the

procedures followed by the California Adult Authority in revoking his parole, constitutional due process would have required that he be afforded a court hearing, with the rights to be represented by counsel, to confront and cross-examine witnesses and to have process to summon witnesses to support his denial of violation of parole. This Court noted that such contention had been litigated many times and always rejected and the Court speaking through Judge Madden rejected the contention with the following observation:

> "If the appellant's contentions were valid, the use by the states and the federal government of the beneficent practice of releasing prisoners from the confines of the prison to the custody and supervision of parole officers would be impracticable and would have to be abandoned. The release from the confines of the prison would become substantially equivalent to the discharge of the prisoner from his sentence, and if, as in the instant case, the parolee denied either the fact of the violation or the legal sufficiency of the act alleged to be a violation of his parole, the prison authorities would be required, in a hearing before a judge, with all the

> concomitants of a non-jury criminal trial, to justify their resumption of in-prison custody of their prisoner."

In Richardson v. Markley (1965, Seventh Circuit) 339 F.2d 967, a federal prisoner sought habeas relief alleging that his rights were violated when he was returned to prison without a "preliminary interview" for violation of parole at or near the alleged violation of parole. The court held (at p. 970) that petitioner's constitutional rights were not violated by the failure of the Parole Board to hold such a hearing after petitioner had been arrested for parole violation.

In U.S. v. Ragen (1949, Seventh Circuit) 177 F.2d 303, 304, a state prisoner's parole was revoked and he claimed that the parole revocation hearing violated his constitutional rights to due process of law. The court held that the parole revocation hearing was purely statutory and "the right to such hearing is not constitutional."

In Jones v. Rivers (1964, Fourth Circuit) 338 F.2d 862, a federal parolee sought release on habeas corpus on the ground that he was denied the right to counsel at his parole revocation hearing. The court stated that "the only question presented on appeal is whether due process requires that an indigent parolee be provided with appointed counsel at parole

revocation proceedings before the District of Columbia Board of Parole." (Page 863.) The court held that due process was not involved stating at page 874:

> "Freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace -- it is neither a constitutionally guaranteed nor a God-given right."

In Hyser v. Reed (1963, District of Columbia Circuit) 318 F.2d 225, 237, a federal prisoner urged that the various elements of the Sixth Amendment relating to venue, notice of charge, confrontation, compulsory process for witnesses and right to counsel are included in the due process restrictions of the Fifth Amendment as they apply to actions of the Parole Board. The court rejected this claim and held (p. 238) that due process did not require appointment of counsel for indigent parolees, nor require the Board to allow cross-examination of its sources of information in parole revocation proceedings.

II. DUE PROCESS DOES NOT REQUIRE RIGHT TO COUNSEL, CONFRONTATION, SWORN EVIDENCE OR PROXIMITY IN PAROLE REVOCATION HEARINGS.

In some jurisdictions a parolee is given the right to a hearing on parole revocation by statute.

(E.g., Section 24-206 District of Columbia Code; 18 U.S.C. § 4207; Illinois Parole Act cited in U.S. v. Ragen, supra.) In such jurisdictions the hearing contemplated is not a criminal trial with the usual rights to counsel, confrontation, process, etc., normally associated with adversary proceedings.

In Lopez v. Madigan (1959, D.C., N.D. Calif.) 174 F.Supp. 919, cited with approval by this Court in Williams v. Dunbar, supra, a federal prisoner sought release on habeas corpus claiming that he had been denied assistance of counsel in his parole revocation hearing. The court held: (P. 921)

> "Hearings before the Board [pursuant to 18 U.S.C. § 4207] are not adversary proceedings. They are informal, unsworn, and not bound by the rules of evidence. [Citation.] Their purpose is as much to form a part of the rehabilitation process as to provide a check on the administrative decision, already tentatively made, that the conditions of release were violated."

In Gonzales v. Patterson (1966, Tenth Circuit) 370 F.2d 94, a state prisoner sought habeas corpus relief alleging he had been denied the rights of confrontation and the assistance of counsel at his parole revocation hearing. The trial court's summary

denial of relief was affirmed.

In Washington v. Hagan (1960, Third Circuit) 287 F.2d 332, a federal prisoner claimed that he was denied the right to counsel at his parole revocation hearing. The prosecution admitted that he was not informed he was entitled to counsel and that if he had asked for counsel, he would not have been allowed to be represented at the hearing by a lawyer. The court noted (p. 334) that the federal practice for more than fifty years has been to allow a hearing but not representation by counsel. The denial of habeas corpus relief was affirmed.

III. REVOCATION OF APPELLANT'S PAROLE WAS NOT ARBITRARY OR CAPRICIOUS.

The only constitutional question which arises upon a revocation of parole is whether the action taken was arbitrary or capricious. Revocation of parole must be for "cause." Penal Code § 3063; Hyser v. Reed, 318 F.2d 225, 242. Such cause would usually be a violation of the conditions of the parole though it is not necessarily limited to such violation. There must be some substantial evidence of such cause but the reliability of that evidence is for the Adult Authority, not the courts. Lopez v. Madigan, 174 F.Supp. 919, 922; Williams v. Dunbar, 377 F.2d 505, 506. And this Court has made it clear that a mere conclusory allegation

that the decision to revoke parole was arbitrary and capricious does not raise a constitutional question. Williams v. Dunbar, 337 F.2d 505, 506.

In this case the Adult Authority acted upon its parole officer's written report specifying seven separate violations of Appellant's parole, together with the evidence supporting those violations. The report also evaluates Appellant's adjustment on parole and concludes with the recommendation that parole be revoked. (Record, pp. 73-81.) That report provided the "cause" and the evidence which justified the action of the Adult Authority in this case. In view of that report it cannot be said that revocation of Appellant's parole was arbitrary or capricious.

IV. PROBATION CASES COMPARED.

While the United States Supreme Court has not rendered an opinion upon the constitutional requirements of revoking parole, it has considered probation revocation procedures in three cases.

In Burns v. U.S. (1932) 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266, this Court affirmed an order revoking probation of a federal prisoner and the Supreme Court granted certiorari. The prisoner claimed he was entitled to previous notice of specific charges of violation and a hearing on those charges. The court, speaking through Mr. Chief Justice Hughes said:

[illegible]

[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

(pp. 222-223)

> "The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. [Citation.] It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.' [Citation.] While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

In Escoe v. Zerbst (1935) 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566, a federal prisoner sought release on habeas corpus on the ground that his probation had been revoked without any hearing before the court. The court, speaking through Mr. Justice Cardozo reversed the order dismissing the habeas petition because the

[illegible]

[illegible]

[illegible]

federal statute on probation required that the probationer "shall forthwith be taken before the court" and this mandate was disobeyed. The opinion added: (pp. 492-493.)

> "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. Burns v. United States, 287 U.S. 216 [53 S.Ct. 154, 77 L.Ed. 266]. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided in the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. . . ."

In Mempa v. Rhay and Walking v. Rhay (1967) 386 U.S. 907, 87 S.ct. 852, 17 L.Ed.2d 781, petitioners

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had been convicted in the state courts in Washington and were placed on probation with sentencing deferred. Later they were returned to court for violating probation. Mempa was not represented by counsel, was not asked if he wanted counsel and no inquiry was made about the appointed counsel who previously represented him. Walking was granted a week to retain counsel, but the court proceeded when his retained counsel did not appear. Appointed counsel was not offered and would not have been granted if requested. The court revoked probation of both on the hearsay testimony of the probation officer that petitioners had committed certain offenses while on probation and sentenced them to state prison. The Washington Supreme Court denied habeas corpus and the United States Supreme Court granted certiorari. The court, speaking through Mr. Justice Marshall, reversed the judgments denying habeas relief holding "that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." The opinion reasons that the right to appointed counsel made applicable to state felony cases by Gideon v. Wainwright (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, applies not only to representation during trial on the merits but also to "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Citing Townsend v. Burke (1948) 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690,

the opinion states that the right to appointed counsel applies at sentencing. The opinion relies heavily on the fact that certain legal rights may be lost if not exercised at this particular stage of the case under Washington law, including the right to appeal.

It is submitted that this case is limited in its application to require counsel at the time of sentence with or without a contemporaneous revocation of a prior probation and would not apply to a case of revocation of probation granted after sentence had been pronounced and its execution suspended as is authorized by California law. This is indicated by the lack of any reference to Burns v. U.S., supra, and Escoe v. Zerbst, supra. If the court meant to overrule Burns and Escoe, surely there would be some mention of these cases in the opinion.

Even if Mempa v. Rhay, supra, establishes a right to counsel in all probation revocation proceedings, there remains an important distinction between parole revocation and probation revocation. Arketa v. Wilson (1967, Ninth Circuit) 373 F.2d 582. The probationer is not serving his sentence while on probation but the prisoner is serving his sentence while on parole. Hutchison v. Patterson (1967, D.C. Colo.) 267 F.Supp. 433. The questions to be decided at a probation violation hearing may well affect the adjudication of

guilt as was pointed out in Mempa v. Rhay, supra. But the question to be decided on parole revocation is one of determining what course is best suited to rehabilitation of the offender. As stated in Washington v. Hagan, 287 F.2d 332 at 334:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

V. APPELLANT HAS FAILED TO EXHAUST AND HAS DELIBERATELY BYPASSED AVAILABLE STATE REMEDIES.

28 U.S.C. 2254 provides in part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless

> it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."
>
> (Emphasis added.)

The question of the validity of parole revocation procedures may be raised by petition for habeas corpus in the California state courts. In re McLain (1960) 55 Cal.2d 78, 85, 357 P.2d 1080. Original jurisdiction in habeas corpus proceedings is vested in "the Supreme Court, courts of appeal, superior courts, and their judges." California Constitution, art. VI, § 10. Appellant filed a habeas corpus petition in the Tuolumne County Superior Court but has not sought habeas relief either in the California District Court

of Appeal or in the California Supreme Court (AOB 1). In Morehead v. State of California (1964, Ninth Circuit) 339 F.2d 170, this Court held that until a state prisoner's remedies by habeas petition to the California District Court of Appeal and Supreme Court were exhausted, the District Court had no power to grant his petition for habeas corpus, citing 28 U.S.C. section 2254 and Fay v. Noia (1963) 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

CONCLUSION

Appellant had no constitutional or statutory right to a hearing on revocation of parole. Due process does not require the right to assistance of counsel or confrontation of witnesses in parole revocation hearings. The revocation of Appellant's parole was not arbitrary or capricious. No federal question

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is presented, nor has Appellant exhausted available state remedies. The order dismissing the petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I certify that in connection with the presentation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: January 17, 1968.

JACK R. WINKLER
Deputy Attorney General